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Supreme Court, U.S.
FILED
MAR 3 1994
OFFICE OF THE CLERK

93-1244

NO. 93-124

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GEORGE FITZPATRICK and HEZA FITZPATRICK,
Petitioners,

vs.

JACK MACKEY and SGT. LEE MEYER,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Whether the act of a deputy sheriff in conveying to an operator of group homes for the mentally retarded a message from the superintendent of the Department of Mental Retardation that the operators' records were frozen, constituted an unreasonable seizure in violation of the fourth amendment of the United States Constitution.

LIST OF PARTIES

The parties to this proceeding are Petitioners, George Fitzpatrick and Heza Fitzpatrick, and Respondents, Sgt. Lee Meyer and Jack Mackey.

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The Respondent, Sgt. Lee Meyer, respectfully prays that the Petition for Writ of Certiorari filed herein by the Petitioners, George Fitzpatrick and Heza Fitzpatrick be denied.

OPINIONS BELOW

Respondent Meyer agrees that the opinions below are as stated by Petitioner and as contained in the Appendix to the Petition.

JURISDICTION

The Respondent Meyer agrees with Petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioners correctly state the procedural posture of this litigation except for their statement that "...the United States Court of Appeals for the Sixth Circuit agreed with the standard which the District Court used to define qualified immunity." Inasmuch as the District Court found a Fourth Amendment violation when, in fact, there had been no seizure, it must be concluded that the standard was misapplied by the District Court.

Their statement of the underlying facts, although not actually erroneous, paints an inaccurate picture as a result of misplaced emphasis and attempt at dramatization.

There are two pivotal events in the factual backround upon which the issues herein focus. The first is a telephone conversation between Respondent Mackey and Respondent Meyer immediately before the latter went to the Petitioners' premises to investigate the abuse complaint. The statement made to Respondent Meyer by Respondent Mackey was, "Advise Mr. Fitzpatrick that my people will be in his home tonight and his records are frozen."

The second event was the conveyance of that message to the Petitioner, Mr. Fitzpatrick, by Respondent Meyer.

These events must be viewed in the light of two particularly significant facts. First, the State of Ohio, in licensing the operation of the group homes by Petitioners, retained the right to review Petitioners' records. Second, and most significatly, Respondent Meyer did not, at any time, take possession of, examine or even see Petitioners' records.

REASONS FOR DENYING THE WRIT

Although often repeated and variously stated, the only reason for granting certiori advanced by Petitioners is their contention that the Court should take this opportunity to redefine "seizure".

In response, two points need to be made. This Court has quite clearly defined "seizure" a number of times, and this case presents a most improbable factual basis for defining "seizure". This Court has defined "seizure" in United States v.Jacobsen, (1984) 466 U.S. 109, 80 L. Ed.2d 85, 104 S. Ct. 1652; Florida v. Bostick, (1991) 501 U.S. ___, 115 L. Ed.2d 389, 111 S. Ct. 2382, United States v. Place, (1983) 462 U.S. 696, 77 L. Ed. 2d 110, 103 S Ct 2637; Soldat v. Cook County, (1992) ___U.S.___, 121 L. Ed.2d 450 113 S.

Ct. 538 and Coolidge v. New Hampshire, (1971) 403 U.s. 443, 29 L. Ed.2d 564, 91 S. Ct. 2022

In Jacobsen a white powdery substance found by baggage handlers on a damaged package was taken by federal agents, tested and found to be cocaine. This Court, in reversing the circuit court, found no Fourth Amendment violation. In Bostick this Court found that a police officer's request to search luggage did not constitute a seizure. The holding in Place was that a temporary detention of luggage for exposure to trained narcotic detention dog was not a seizure but that a 90 minute detention was unreasonable. The participation of police officers in an eviction from and removal of a mobile home was found to violate Fourth Amendment rights in Soldat. In Coolidge a wife's

voluntary delivery of her husband's guns and clothing to police officers did not, in this Court's opinion, involve a seizure.

It would be difficult to imagine a set of facts so ill-suited as an exemplar in the defining of "seizure" as are the facts of the present case. The limit of Respondent Meyer's participation was the delivery of Respondent Mackey's message that Petitioner's records were frozen. In delivering the message he made it clear that it was, in fact, a message. He issued no orders. He gave no instructions. He did not segregate, examine or even see the records,much less do anything to affect their possession or location.

If the Court were to reveiw this case it would be only to state the obvious conclusion already reached by the circuit court - that the conduct of Respondent Meyer did not constitute a seizure; that there was no Fourth Amendment violation and that Respondent Meyer has the benefit of a qualified immunity.

It is respectfully submitted that the petition in this case amounts to nothing more than a request that this Court extend the definition of "seizure" into the area of fiction and cause it to lose any practical meaning.

CONCLUSION

Because this Court has defined "seizure" as used in the Fourth Amendment and because the Court of Appeals for the Sixth Circuit has followed that definition in finding that there was no seizure in the present case, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 1, 1994